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No. 1673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,

Petitioner,

vs.

ROBERT EARL MISTER, on behalf of himself and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The Illinois Central Gulf Railroad (ICG) presented issues in its petition for certiorari suggesting a serious abuse of appellate discretion by the United States Court of Appeals for the Seventh Circuit.

In an orderly system of justice the judgment by the trial court for the ICG would have unquestionably been sustained in the

appellate court. But the appellate court inexplicably reassessed facts previously weighed and decided in the trial court, considered new statistical facts it created, recognized but failed to properly apply the pertinent decisions of this Court, and reversed outright the district court's decision. Petitioner now faces liability for millions in damages and fees. Petitioner's counsel presented its petition because of the capriciousness of the appellate court decision. The appellate court has undermined predictability and reliability in its opinion in this case. The issues presented by the petition for certiorari are both important and disturbing.

In response to the petition for certiorari, respondents have filed a brief in opposition in which petitioner is accused of intentional misrepresentations. Petitioner neither acquiesces in the charges made nor concedes that the issues it presented in its petition are not of the highest importance.

The errors contained in respondents' brief cannot be explained either as a misunderstanding or as vigorous advocacy. The only conclusion is that respondents have attempted to prejudice the administration of justice by this Court in raising false and misleading new matters. Petitioner is compelled to correct the record and to re-elevate the issues presented in its petition to the plane of importance on which they deserve to be considered.

I. RESPONDENTS HAVE MADE PREJUDICIAL MISREPRESENTATIONS IN ARGUING THAT THIS COURT SHOULD NOT REVIEW THIS CASE.

Respondents accuse this petitioner of misrepresenting the record. Brief in Opposition, pp.9–11. No more prejudicial or improper argument could be made to this Court if the accusations are false. The misrepresentations alleged by respondents concern a few issues of pivotal importance and several that are irrelevant to an appraisal of the petition for writ of certiorari. A review of the record, including the transcript of proceedings, trial exhibits,

and final order of the district court, conclusively shows that the only "misstatements" or misrepresentations have been made by respondents.

A. Reply to Paragraph One of Argument I of Respondents' Brief in Opposition to Petition

Respondents have accused petitioner of deceiving this court concerning the trial court's findings of fact and conclusions of law on one of the most important issues in the trial, the proper weight and credibility to be given to respondents' statistical analysis. Brief in Opposition, p.9. In the facile misuse of a quotation from the trial court's opinion and the failure to recite other portions of the trial court's opinion the respondents suggest that petitioner has mischaracterized the district court's findings. Brief in Opposition, p.9. Nothing could be further from the truth. The statistical defense offered by petitioner at trial was two pronged. First, petitioner attacked the *data* underlying respondents' statistical analysis. Second, petitioner attacked respondents' failure to take into account the existence of local labor markets in their statistical calculations, an essential variable which left their calculations flawed.

In an attempt to prejudice this Court's consideration of the petition, respondents recite a quote from the trial court's decision in which the trial judge decided that it would not accept petitioner's criticisms of the *data base* being used by respondents in their statistical calculations. Brief in Opposition, p.9. Respondents use this quote in an attempt to mislead this Court into believing that the trial court had not in any way found that respondents' statistical analysis had been rebutted by petitioner's evidence.

The petitioner did not limit its defense to a criticism of respondents' data base, but also attacked respondents' statistical analysis for the reason that it had failed to account for the numerous local labor markets in which ICG hired its employees.

Petitioner contended at trial that failure to account for those labor markets would produce large invalid statistical deviations suggesting discriminatory hiring. In response to this argument, the district court specifically held: "Failure of [respondents' expert] to account for the many individual labor markets creates an adequate *rebuttal* of the inference of discrimination." *Mister v. Illinois Central G. R.R.*, 639 F. Supp. 1560, 1577 (S.D. Ill. 1986), *aff'd in part, rev'd in part*, 832 F.2d 1427 (7th Cir. 1987) (emphasis added). Respondents have thus mischaracterized the district court's findings which properly formed the basis for its judgment for petitioner.

B. Reply to Paragraph Two of Argument I of Respondents' Brief in Opposition to Petition

Respondents state that petitioner misrepresented the appellate court's application and discussion of the proper allocation of the burdens of proof in a class action disparate treatment hiring case as mandated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Brief in Opposition, p.9. Respondents claim that the appellate court applied the principles of *Burdine* to this case and did not criticize the applicability of *Burdine*. Brief in Opposition, p.9. The truth is to the contrary. Any fair reading of the entire appellate court decision compels the conclusion that the appellate court paid lip service to *Burdine* while fundamentally shifting the burden of proof in this type of case to the defendant. The appellate court questioned the applicability of the *Burdine* model of allocation of proof in this type of case thinly veiling its criticism of this Court's decision in *Burdine*. *Mister v. Illinois Central G. R.R.*, 832 F.2d 1427, 1434 (7th Cir. 1987). Petitioner's contention that the appellate court failed to properly apply *Burdine* constitutes proper argument not deceit as suggested by respondents.

C. Reply to Paragraph Three of Argument I of Respondents' Brief in Opposition to Petition

Respondents suggest that petitioner has misrepresented the evidence at trial pertaining to a crucial factual issue, whether petitioner hired from one large labor market which encompassed its entire St. Louis Division or hired from numerous local labor markets surrounding the more than forty job locations that existed in ICG's St. Louis Division. Brief in Opposition, pp.9–10. If petitioner hired in numerous local labor markets, then the trial court's decision was correct because respondents' statistics failed to account for those markets.

Respondents suggest to this Court that the hiring clerk, Mary Annette Lane, who made all hiring decisions for the petitioner, made no effort to hire locally. Brief in Opposition, pp.9-10. In fact, no honest interpretation of the citations to the record contained in this section of respondents' brief can support the assertion that the hiring clerk "did not know where people would work when she made the hiring decision." Quoting brief in Opposition, p.10. Contrary to respondents' remarkable assertion, the hiring officer was aware of open job locations when she hired personnel. (T. 821). Page after page of the trial transcript discloses that the hiring clerk specifically considered a person's location of residence in filling jobs in the various locations for which she was hiring. (T. 574-839). Petitioner's statistical expert confirmed in his studies that petitioner hired from local labor markets exceeding forty in number. Defendant's Exhibit 4. Although respondents characterize their contention concerning the hiring clerk as a "finding at trial," (Brief in Opposition, p.9), they fail entirely to cite to any part of the district court's order to support their contention because no support exists in the order or in the trial record. These arguments were properly considered and rejected in the trial.

CONCLUSION

Respondents' brief in opposition is a deceptive effort to convince this Court that petitioner has made intentional misrepresentations of the record and opinions below in order to convince the Court that its petition should be granted. The truth is shown to be to the contrary. Other issues raised in the brief in opposition were adequately discussed in the petition and no right to reply exists. Sup. Ct. Rule 22.5.

The petition for certiorari shows that the decision of the United States Court of Appeals for the Seventh Circuit is a flagrant abuse of the clearly erroneous standard of review mandated by Fed.R.Civ.P. 52(a). In addition, the petition shows that the appellate court held respondents to a much higher standard of proof than that enunciated in *Burdine*, in that the appellate court required ICG to prove rather than articulate a nondiscriminatory reason for any disparities in respondents' statistics. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I, Richard F. Nash, a member of the Bar of the Supreme Court of the United States and counsel of record for Illinois Central Gulf Railroad Company, Petitioner herein, hereby certify that on April 23, 1988, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the attached Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari on the parties herein, as follows:

On Robert Earl Mister on behalf of himself and all others similarly situated, Respondents herein, by depositing such copies in the United States mail with first class postage prepaid, properly addressed to the post office address of Jerome J. Schlichter, the above-named Respondents' counsel of record, at 412 Missouri Avenue, East St. Louis, Illinois 62201, and on Jeffrey C. Bannon, amicus counsel, Equal Employment Opportunity Commission, 2401 E. Street Northwest, Room 224, Washington, D.C. 20507, and on Mr. Charles Fried, Solicitor General, United States Government, Dept. of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

All parties required to be served have been served.

Dated April 23, 1988.

/s/ Richard Nash